IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.BALAKRISHNAN NAIR

THURSDAY, THE 19TH JULY 2007 / 28TH ASHADHA 1929

WP(C).No. 23655 of 2004(N)

PETITIONER:

DR.G.HARIDAS, CIVIL SURGEON
(UNDER ORDERS OF COMPULSORY RETIREMENT),
COMMUNITY HEALTH CENTRE, BADIYADUKKA,
KASARGOD, RESIDING AT `SITHARA',
INDUSTRIAL ESTATE ROAD, MANJERI.

BY ADV. SRI.KRB.KAIMAL
SRI.B.UNNIKRISHNA KAIMAL

RESPONDENT:

STATE OF KERALA, REPRESENTED BY
THE PRINCIPAL SECRETARY TO GOVT. OF KERALA,
VIGILANCE `C' DEPARTMENT,
SECRETARIAT, THIRUVANANTHAPURAM.

BY GOVERNMENT PLEADER SRI. BIJOY CHANDRAN

THIS WRIT PETITION (CIVIL) HAVING BEEN FINALLY HEARD ON 19/07/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

WPC.NO.23655/2004 N

APPENDIX

PETITIONER'S EXHIBITS:

EXT.P1: **COPY OF THE ORDER NO.EC.5.110109/97/DHS DTD. 3/11/1999 ISSUED BY THE DIRECTOR OF HEALTH SERVICES, TRIVANDRUM.**

EXT.P2: **COPY OF THE ORDER G.O.(MS) NO.77/99/VIG. DTD. 1/09/1999 ISSUED BY THE RESPONDENT.**

EXT.P3: **COPY OF THE DEPOSITION OF PW1 IN E.C.NO.9/99 BEFORE THE VIGILANCE TRIBUNAL, KOZHIKODE.**

EXT.P4: **....DO...DO.... OF PW2 .....DO....**

EXT.P5: **....DO...DO.... OF PW3.....DO....**

EXT.P6: **....DO...DO.... OF PW4.....DO....**

EXT.P7: **....DO...DO.... OF PW11 .....DO....**

EXT.P8; **COPY OF THE ADDL.WRITTEN STATEMENT FILED BY THE PETITIONER BEFORE THE VIGILANCE TRIBUNAL, KOZHIKODE IN E.C.9/9.**

EXT.P9: **COPY OF THE SHOW CAUSE NOTICE NO.1596/C2/2003/VIG. DTD. 2/04/2003 ISSUED BY THE RESPONDENT TO THE PETITIONER.**

EXT.P10: **COPY OF THE ENQUIRY REPORT ISSUED TO THE PETITIONER ALONG WITH EXT.P9.**

EXT.P11: **COPY OF THE REPLY DTD. 22/07/2003 SUBMITTED BY THE PETITIONER TO THE RESPONDENT.**

EXT.P12: **COPY OF THE GOVT.ORDER G.O.(MS) NO.43/2004/VIG. DTD. 14/07/2004.**

EXT.P13: **COPY OF THE LETTER NO.A1(1) 31363/2003/GW DTD.25/05/04 FROM THE P.S.C. TO THE RESPONDENT.**

/TRUE COPY/

P.A.TO JUDGE

KSS

K.BALAKRISHNAN NAIR,J

W.P.(C)NO.23655 of 2004

Dated this the 19th day of July, 2007

JUDGMENT

The petitioner was a Civil Surgeon working under the respondents. He was the accused in Vigilance Crime No.VC 7/1997 registered by the Deputy Superintendent of Police, Vigilance and Anti Corruption Bureau, Malappuram. The allegation against him was that he received bribe from the husband of a patient and he was arrested following a trap laid by the vigilance police. After investigation the vigilance decided not to prosecute the petitioner before the Vigilance Judge, but recommended disciplinary action against him. The matter was referred by the Government to the Vigilance Tribunal, Kozhikode for enquiry. The case was taken on file by the Vigilance Tribunal as VC No.9/1999. The Tribunal submitted Ext.P10 enquiry report, finding the petitioner guilty of the charges levelled against him

and recommending the punishment of compulsory retirement from service. The Government accepted the findings of the Enquiry Commissioner and issued Ext.P9 show cause notice to him along with the copy of the enquiry report, proposing the punishment of compulsory retirement from service. The petitioner submitted Ext.P11 reply stating that the findings of the Tribunal are unsustainable in law and therefore, the same may not be accepted. The petitioner was heard and thereafter the Government decided to reduce the punishment to one of barring increment for two years with cumulative effect. The PSC was consulted on the above proposal. The Public Service Commission issued Ext.P13 communication stating that punishment of compulsory retirement should be imposed on the petitioner. The Government accepted the opinion of the PSC and issued Ext.P12 order, compulsorily retiring him from service on 14.7.2004. This writ petition is filed challenging Ext.P12 and also seeking a direction to reinstate him in service with all consequential benefits. The following grounds are taken in the writ petition. The impugned order is arbitrary and illegal and the same violates his

fundamental rights under Articles 14, 16 and 21 of Constitution of India. The procedure followed by the Government violates the law laid down by the Apex Court in **Managing Director ECIL** v **B.Karunakar** (1993(4) SCC 727). The Government should not have accepted the findings of the Tribunal before furnishing him with a copy of the enquiry report and giving him a chance to represent against it. According to the petitioner, the PSC has jurisdiction only to give its views on the quantum of punishment on the charges proved . It has no jurisdiction to interfere with the findings of the Government. The wrong advice tendered by the PSC was accepted by the Government without application of mind. Based on the materials on record the findings of the Tribunal against the petitioner are unwarranted. On the above grounds, the petitioner sought the above aforementioned reliefs.

2. The respondent has filed a counter affidavit supporting the impugned order. Heard the learned counsel on both sides.

3. The enquiry report is a material that is being used against the delinquent. During the course of the enquiry the delinquent will not be aware what will be the effect of the

evidence tendered and what will be the Tribunal's conclusion. On these aspects he is entirely in the dark. The findings of the enquiry officer can be correct, it may be wrong or even perverse. Acceptance of that report will have adverse consequences on the delinquent. That is why a right is granted to the delinquent to comment on the enquiry report before the same is accepted by the disciplinary authority when the enquiry is held by another authority. In this case the disciplinary authority went through the enquiry report and accepted the conclusions therein and also decided on the proposed penalty. Thereafter Ext.P9 show cause notice was issued. The petitioner submits, by the said procedure he was seriously prejudiced. If he was allowed to represent before the findings were accepted, it was possible that the Government may not have accepted the report. The possibility of deciding to impose a minor penalty also cannot be ruled out. In that event consultation with the PSC would be unnecessary also. Though the petitioner was heard by the Government after accepting the findings in the report, he was able to disabuse the Government to certain extent, and therefore, it decided to reduce

the penalty to one of barring two increments with cumulative effect. On consultation, the PSC advised to accept the findings of the Enquiry Tribunal and the suggestion of punishment in the report. The Government accepted the said advice and imposed the penalty. The petitioner says the Government have acted mechanically without application of mind. So he prays for quashing the impugned order.

4. The learned Government Pleader, on the other hand, submits that by the non-furnishing of the copy of the enquiry report, the petitioner was not prejudiced. He has effectively represented and his version was prima facie accepted by the Government and it proposed to reduce the penalty also. So, according to the learned G.P., the petitioner was in no way prejudiced by the non-furnishing of the copy of the enquiry report in advance. It is also submitted that the Government decided to follow the views of the PSC rightly.

5. Going by the decision of the Apex Court in **Union of India v Muhammed Ramzan Khan** (1991(1) SCC 588) and also the decision in **Managing Director ECIL v B.Karunakar**

(1993(4) SCC 727) the procedure followed by the Government in accepting the enquiry report without giving the petitioner a chance to represent against the said report is illegal. In such cases, the disciplinary action from that stage should be quashed, giving liberty to the Government to proceed afresh from there. This view is supported by the Division Bench decision of this court in **W.A.949/2001 dtd.15.11.2002** and also in **Writ petition No.1575/2007** dated 5.2.2007. But, the Apex Court in **State of UP v Harendra Arora** (AIR 2001 SC 2319) has held that unless the employee has suffered prejudice by the non-furnishing of the enquiry report, the dismissal order need not be interfered with. It was a case where a delinquent employee was found to have filed a proper reply to the show cause notice before passing the dismissal order even in the absence of furnishing the copy of the enquiry report. It means even if there is procedural impropriety in not furnishing the enquiry report the same will not conclude the issue. It has to be found whether there was any genuine prejudice caused to the delinquent employee, as a result of non-furnishing the copy of the enquiry report. In this case, Rule 15

(12)(i) of the KCS(CC&A) Rules provides a right to represent against the punishment to be imposed. In the case of employees of several establishments, there is no such provision. They get the enquiry report only along with the dismissal order. They get a chance to say that the findings of the enquiry officer were unwarranted on the facts of the case only at the stage of filing the appeal. See the decision of the Apex Court in **Ramachander** v **Union of India and others**(1986(3) SCC 103). In such cases the decision in **Ramzan Khan** mitigated the grievance of the delinquent by holding that the enquiry report should be furnished before it is accepted and further action is taken on it. It being a material against the employee, it cannot be used without furnishing a copy of the same to him, it was held. But in this case the petitioner was served with the enquiry report with the notice containing the proposed penalty. Based on that, he replied effectively taking all possible contentions available to him including the non-acceptability of the findings of the enquiry officer. The same had the desired effect on the Government and it was proposed to reduce the penalty to one of

barring two increments. So I feel that this is a case where no serious prejudice is caused to the petitioner. But, the learned senior counsel for the petitioner would point out that had the petitioner been given an opportunity to represent at the first instance, the Government might have dropped further action or may have decided only to impose a minor penalty. I think it is a hypothetical contention having regard to the nature of the allegations and findings in the enquiry report. The chances of such a contingency are remote.

6. But, I feel that the action of the Government in accepting the views of the PSC was in a mechanical manner and without application of mind. Going by Ext.P13 opinion given by the PSC, it can be seen that no reasons or grounds are given for arriving at the conclusion contained in the last paragraph of that opinion. In view of the nature of the opinion of the PSC, I feel that the acceptance of the same mechanically is unjustified. It will reveal total non-application of mind from the part of the Government. The impugned order would show that Government proceeded on footing that it is bound to follow the views of the PSC. It is for

the disciplinary authority to take the decision. The PSC only renders its advice. Of course, the advice has to be accepted, if it is found to be a reasonable one. The advice can be overruled by the Government by following the due procedure of again consulting the PSC. I think, having regard to the facts of the case, the course adopted by the Government to accept the views of the PSC in a mechanical manner is unjustified. It has abdicated its statutory function as a disciplinary authority by not taking an independent decision on the materials before it. Accordingly Ext.P12 order is quashed. Now that the views of the Government on punishment are clear, if so advised, the petitioner may file a representation before the Government against imposing such a punishment. Considering that representation, the Government shall take a fresh decision on the penalty, if necessary, after fresh consultation with the PSC. The petitioner shall be given an opportunity of being heard also before proceeding further in the matter. Such a hearing is necessary, as the officer who heard the petitioner may not be the decision maker now. The Government may pass fresh orders as expeditiously as possible preferably

within three months. If the Government think that the views of the PSC cannot be accepted, it is bound to follow the due procedure to overrule it. These are all matters for the Government to decide. The Government shall take a fresh decision in the matter, in accordance with law. The disciplinary authority will be free to decide whether the petitioner should be reinstated in service or kept under suspension pending final orders in the matter.

The writ petition is disposed of as above.

K.BALAKRISHNAN NAIR,
JUDGE

cs